Filed 6/6/19 P. v. Grinolds CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS GRINOLDS , Defendant and Appellant.	D073843 (Super. Ct. No. SCD273150)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

Lillian Hamrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Arlene A. Sevidal and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Nicholas Grinolds of robbery (Pen. Code,[1] § 211; count 1) and resisting a peace officer (§ 148, subd. (a)(1); count 3). It found true an allegation as to count 1 that Grinolds personally used a dangerous and deadly weapon, specifically a piece of glass. (§§ 1192.7, subd. (c)(23), 12022, subd. (b)(1).) It found Grinolds not guilty of assault with a deadly weapon. (§ 245, subd. (a)(1); count 2.) The court sentenced Grinolds to four years in prison.

Grinolds contends the court prejudicially erred by: (1) rejecting his request for a clarifying instruction that the use of force in a robbery must be motivated by the intent to take stolen property; (2) informing the jury the robbery continued after he surrendered the stolen property; (3) misinstructing the jury that self-defense is not applicable to the crime of robbery; and (4) failing to instruct the jury on its own motion that self-defense is a defense to robbery. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

E.M. worked as a convenience store manager and cashier. He testified that in August 2017, Grinolds and his girlfriend, C.S., were in the convenience store looking at glass water pipes. Surveillance camera videos, which were shown to the jury, captured some of their interactions. E.M. said that posted signs in the store informed customers not to touch the merchandise. Moreover, he orally told Grinolds the same thing. E.M.

---

1 Undesignated statutory references are to the Penal Code.

saw Grinolds remove merchandise from the wall and put it in his pocket. He confronted Grinolds, asking him to hand it over. Grinolds refused, telling E.M. not to touch him. E.M. and his brother, A.M., prevented Grinolds from leaving the store. Grinolds removed from his pocket something that appeared to E.M. to be a knife. On the sidewalk just outside the store, E.M held Grinolds in a headlock while waiting for the police. Grinolds broke a glass pipe that he had taken from the store and stabbed E.M.'s arm. C.S. hit E.M. in the head. E.M. warned Grinolds that if he did not calm down, E.M. would choke him and "put [him] to sleep". Police arrived within a few minutes, and E.M. released Grinolds. E.M. received medical attention for his injury, and his arm bore a scar.

A.M. testified that during the incident he helped E.M. detain Grinolds until police arrived. A.M. thought he saw some objects fall out of Grinolds's pockets, including glass and something that looked like metal.

San Diego Police Department officers responded to the scene and found pieces of a glass pipe on the ground outside the store. One officer testified Grinolds appeared under the influence of a controlled substance. They handcuffed Grinolds and transported him to a mental health facility. There, Grinolds unsuccessfully tried to run from police.

Defense Case

C.S. testified she accompanied Grinolds to the convenience store to buy a glass pipe for medical marijuana. After a while, C.S. heard E.M. say he would check the cameras. Grinolds immediately told her that they should leave to avoid trouble. Shortly afterwards, E.M. grabbed and attacked Grinolds. E.M. checked C.S.'s bag and asked

Grinolds to empty his pockets, but Grinolds had nothing there. E.M. and Grinolds yelled at each other. C.S. left the store but saw E.M. holding down Grinolds; therefore, she tried removing E.M. off Grinolds. She was scared as she saw E.M. beating Grinolds, whose "veins [were] popping out of his neck." Grinolds could not breathe because E.M. was restraining him so hard. E.M. also kneed Grinolds, and C.S. thought Grinolds was going to die. C.S. denied stealing anything from the store, but she admitted that during the incident she returned to the store and left an item there.

Grinolds testified that he had slipped a glass pipe from the store into his pocket. When his counsel asked him why he did it, Grinolds responded, "Honestly, I can't tell you [a] definite reason why. Like I said, we had money. We had the ability to purchase things. [¶] Finances are not a problem for us. I have a full-time job. [C.S.] works too. [¶] I don't know. Habit." Grinolds testified he initially resisted E.M.'s request to empty his pockets, but he eventually moved to the store's entrance "so that I can feel safe that I'll have a way to leave after I give [E.M.] the [glass pipe]."

According to Grinolds, when he eventually complied with E.M.'s request, E.M. smacked the pipe out of his hand, and it landed by the door. E.M. threatened him, put his arms around Grinolds's throat, choked him, and repeatedly kneed him in the kidneys. E.M. also continued to "headbutt" Grinolds. A.M. joined in attacking Grinolds. Grinolds claimed that E.M. lifted him up in the air and slammed him to the ground. Grinolds denied stabbing E.M. in the arm and denied having a knife on his person during the incident.

DISCUSSION

"It is well settled that a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation]—evidence sufficient for a reasonable jury to find in favor of the defendant [citation]—unless the defense is inconsistent with the defendant's theory of the case." (*People v. Salas* (2006) 37 Cal.4th 967, 982.) Similarly, "[a] trial court need only give those requested instructions supported by evidence that is substantial." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 125, judg. vacated and cause remanded on other grounds *sub nom. Bacigalupo v. California* (1992) 506 U.S. 802.)

"In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' " (*People v. Salas, supra,* 37 Cal.4th at pp. 982-983.) "The court must 'take the proffered evidence as true, "regardless of whether it was of a character to inspire belief. . . . [Citations.]" [Citation.] " 'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citations.]" ' [Citation.] On appeal, we independently review the court's refusal to instruct on a defense." (*People v. Orlosky* (2015) 233 Cal.App.4th 257, 270.)

Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Thus, "[r]obbery is larceny with the aggravating circumstances that 'the property is taken from the person or presence of

another' and 'is accomplished by the use of force or by putting the victim in fear of injury.' [Citation.] In California, '[t]he crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.' " (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) Accordingly, the offense is robbery even when the property was peacefully acquired if force or fear was used to retain it or to carry it away. (*Ibid.; People v. Bradford* (2010) 187 Cal.App.4th 1345, 1349.)

The intent required for robbery is the specific intent permanently to deprive the victim of the property. (*People v. Anderson, supra*, 51 Cal.4th at p. 994.) Because " '[a]s a general rule, no crime is committed unless there is a union of act and either wrongful intent or criminal negligence' " (*ibid.*), " 'the act of force or intimidation by which the taking is accomplished in robbery must be motivated by the intent to steal . . . ' " (*Ibid.*) Although all the elements of robbery must be satisfied before the crime is completed, "no artificial parsing is required as to the precise moment or order in which the elements are satisfied." (*People v. Gomez* (2008) 43 Cal.4th 249, 254.) Nevertheless, if "the intent to steal arose only after force was used, the offense is theft, not robbery." (*People v. Turner* (1990) 50 Cal.3d 668, 688; accord, *People v. Bradford* (1997) 14 Cal.4th 1005, 1055-1056.)

I. *Jury Instruction on Use of Force During a Robbery*

Grinolds contends the court erroneously rejected his proposed pinpoint instruction that the use of force in a robbery must be motivated by the thief's intent to take stolen property. Relying on *People v. Hodges* (2013) 213 Cal.App.4th 531 (*Hodges*), he

contends his proposed instruction "directed the jury's attention to the crucial evidence in the case upon which it could conclude that [he] was not guilty: namely that the force that occurred was not concurrent with [his] taking of the property since he surrendered the property before he was attacked and, therefore, the element of force or fear required to convict him of robbery was not present."

A. *Background*

Grinolds's counsel asked the court to add to CALCRIM No. 1600, the standard instruction on robbery, this sentence: "The defendant's intent to take the property and the act of force or fear must concur such that the use of force or fear was motivated by the intent to take the property." Counsel explained: "I just want to make it perfectly clear for the jury. I know I can argue it, but I think that the sentence is not damaging. It is good case law." The court denied the request: "If I look at element 5 of the pattern instruction, element 6 of the pattern instruction, and the union of act and intent instructions, that is—those principles are adequately covered."

The court therefore instructed the jury with CALCRIM No. 1600 as follows: "The defendant is charged in Count 1 with robbery in violation of Penal Code section 211. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took property that was not his own; [¶] 2. The property was in the possession of another person; [¶] 3. The property was taken from the other person or his immediate presence; [¶] 4. The property was taken against that person's will; [¶] 5. The defendant used force or fear to take the property or to prevent the person from resisting; [¶] AND 6. When the defendant used force or fear, he intended to deprive the owner of

the property permanently or to remove the property from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property. [¶] The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery."

During deliberations, the jury sent the court two different notes that the court responded to after consulting counsel. Jury note No. 1 requested the court rephrase CALCRIM No. 1600's element No. 5. The court responded that the force or fear must be used either to unlawfully obtain the property in the first place or to enable the perpetrator to escape with it. The jury also asked the court, "If a person's intent is to flee and they are in possession of theft items and it takes force for them to flee, is it robbery?" The court replied, "A defendant who uses force or fear in an attempt to escape with property he has take[n] by theft has committed robbery."

B. *Analysis*

We discern no error from the court's ruling that Grinolds's proposed instruction added nothing to CALCRIM No. 1600. A court need not give a pinpoint instruction that is merely duplicative of other instructions. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) CALCRIM No. 1600 expresses the same idea of concurrence of intent as Grinolds's proposed pinpoint instruction, because it states the People must prove that the defendant "used force or fear to take the property or to prevent the person from resisting"; and "[w]hen the defendant used force or fear, he intended to deprive the owner of the

property permanently or to remove the property from the owner's possession for [an] extended period of time." The same instruction also states: "The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery." The instruction conveys the idea that to prove robbery, the intent to take the property must be formed before or during the time the defendant used force or fear, but not after.

Further, the court's response to the jury's questions correctly explained the law regarding the use of force to either take or retain stolen property. "Whether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied . . . in furtherance of the robbery and can properly be used to sustain the conviction." (*People v. Estes* (1983) 147 Cal.App.3d 23, 28; accord, *People v. Gomez* (2008) 43 Cal.4th 249, 259.)

Grinolds's reliance on *Hodges* is unavailing. In that case, the defendant took items from a store. When a loss prevention officer stopped him in the parking lot, the defendant offered to return the goods. The officer refused to take them, and the defendant tossed the items at him, hitting him in the chest. (*Hodges, supra*, 213 Cal.App.4th at pp. 535-536.) The defendant started driving away while the officer was reaching for the defendant's car keys, and thus the officer was dragged along. The car's door struck the officer, knocking him to the ground. (*Ibid.*) At trial, the court rejected a defense request for a pinpoint instruction regarding the legal consequence if defendant had truly abandoned the victim's property. It instead instructed the jury with CALCRIM

No. 1600. (*Hodges,* at pp. 538-539.) During deliberations, the jury asked the court questions regarding that instruction, and the court responded. The Court of Appeal concluded the trial court's response failed to address the crux of the jury's inquiry, which was "whether the timing of defendant's surrender of the property was relevant to the element of force or fear in establishing robbery." (*Id.* at p. 543.) It added, "[the trial] court's instruction was misleading because it allowed the jury to conclude defendant was guilty of robbery without regard to whether [he] intended to permanently deprive the owner of the property at the time the force or resistance occurred." (*Id.* at p. 543.) It also concluded that the trial court's instruction that the fourth element of CALCRIM No. 1600 " 'applies to the confrontation in the parking lot,' improperly resolved the factual conflict inherent in the jury's inquiry regarding the impact of defendant's surrender of the goods prior to the use of force." (*Ibid.*) *Hodges* is distinguishable and does not establish error because the court there was not presented with a request for duplicative instructions. Rather, the issue was the court's failure to properly respond to the jury's questions.

II. *Court's Statement Regarding When the Robbery Ended*

Grinolds contends the court erroneously told the jury that a theft or robbery continues until after the perpetrator has reached a place of temporary safety. He claims that ample evidence showed he either surrendered or tried to surrender the glass pipe to E.M. before any violence occurred. He claims, "In sum, had the jury been instructed that the robbery ended when Grinolds surrendered the [object] inside the store, there is a reasonable chance they would have acquitted him on the robbery charge." He also argues: "Here, as in *Hodges*, the trial court erroneously resolved this issue by telling the

jury that the crime did *not* end inside the store, when Grinolds surrendered the glass [item]. Rather, the court told the jury that '[t]he crimes of theft and robbery continue until the alleged [perpetrator] has reached a place of temporary safety.' "

A. *Background*

During deliberations, the jury sent the court jury note No. 2 containing the following questions: "(1) [W]hen does the robbery end? When police arrive? When they left the store? [¶] (2) [I]f a deadly weapon were used during the time the defendant was restrained[,] would that still be during the robbery? [¶] (3) [F]or count 1's further allegation, does it matter if the weapon is used for self[-]defense?"

After consultation with counsel, the court responded to the jury's questions as follows: "(1) The crimes of theft and robbery continue until the alleged [perpetrator] has reached a place of temporary safety. (2) The crime of robbery does not necessarily require use of a dangerous or deadly weapon. A person may be guilty of robbery even if the allegation of use of a dangerous or deadly weapon is found not true. However, such use, if you find it to be present, may constitute force or fear. If force [or] fear is used to gain [possession] of the property or to escape with it before the alleged [perpetrator] reaches a place of temporary safety, the crime of robbery is committed. If you find that robbery was committed, you should then address whether the [P]eople have proved the allegation true beyond a reasonable doubt. (3) No. The instruction on self-defense [applies] only to count 2." Defense counsel agreed to the first and third responses but objected to the second.

Grinolds acknowledges his counsel did not object to the court's answer to the jury's first question, but argues any objection would have been futile. He requests we address the matter because his substantial rights are affected by the purported erroneous answer. He alternatively argues his trial counsel provided ineffective assistance.[2] We address the issue on the merits and thus need not address the ineffective assistance of counsel claim.

B. *Applicable Law*

" 'When a jury asks a question after retiring for deliberation, "[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law." [Citation.]' [Citation.] 'This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. . . . It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given.' [Citations.] 'We review for an

---

2 Grinolds contends the issue is preserved on appeal because when the jury announced it had reached a verdict, and before the court received it, defense counsel told the court about the *Hodges* decision and its possible application to this case. The court asked counsel whether it should set aside the verdict and further instruct the jury. But counsel replied: "No. We have a verdict at this point. I think the issue is moot. I wanted to supplement the record to be safe." The court ruled: "I think that factually we don't have that set of circumstances here because the evidence it seems pretty uncontroverted, including from Mr. Grinolds, was that he was being held onto and then he was therefore using force to resist before he even got out of the store while he still had this item in his possession. [¶] In any event, I'm not going to reopen argument or instructions at this late stage."

abuse of discretion any error under section 1138.' " (*Hodges, supra*, 213 Cal.App.4th at p. 539.)

C. *Analysis*

The court did not abuse its discretion in answering the jury's question regarding when the robbery ended. As the California Supreme Court has held, "[I]t is settled that the crime of robbery is not confined to the act of taking property from victims. The nature of the crime is such that a robber's escape with his loot is just as important to the execution of the crime as obtaining possession of the loot in the first place. Thus, the crime of robbery is not complete until the robber has won his way to a place of temporary safety." (*People v. Carroll* (1970) 1 Cal.3d 581, 585.) The court gave the jury a correct statement of the law.

Grinolds relies on *Hodges, supra,* 213 Cal.App.4th 531, which as we have explained is distinguishable because the trial court there had improperly responded to the jury's question by resolving a factual conflict in the jury's purview. Specifically, the court stated CALCRIM No. 1600's fourth element applied to the defendant's confrontation in the parking lot. (*Id.* at p. 543.) By contrast, the court here did not decide any jury issue regarding when the robbery ended. It instead left that question for the jury to decide, instructing it that the robbery continued until the defendant had reached a place of safety. The jury, by its guilty verdict, concluded that the robbery was ongoing when Grinolds used force against E.M, and that Grinolds had not reached a place of temporary safety while he was carrying the store's glass pipe.

III. *Jury Instruction Regarding Self-defense as to the Robbery Charge*

Grinolds contends the court misinstructed the jury that self-defense is not a valid defense to a robbery charge. Relying on *People v. Adams* (2009) 176 Cal.App.4th 946, Grinolds argues that "even though [he] was not permitted to use self-defense against [E.M.] if he was engaged in a lawful citizen's arrest for robbery, he was permitted to defend himself against excessive—or unlawful—force used by [E.M.] if he reasonably believed he was ' "in imminent danger of suffering bodily injury.' " . . . There was a great deal of evidence that this was precisely the nature of any force used by Grinolds." We conclude the *Adams* case is inapplicable because it involved a battery charge under section 243, and not a robbery charge. (*Adams*, at p. 948.)

Grinolds acknowledges his trial counsel acquiesced in the court's instruction but contends that in so doing, counsel provided ineffective assistance. We address the issue on the merits.

As to the count 2 assault charge, the court instructed the jury on the merchant's right to use reasonable force. The court separately instructed the jury with CALCRIM No. 3470 on self-defense, emphasizing that this instruction applied to the assault charge but not to the robbery charge.

"Self-defense is not . . . a recognized defense to a charge of robbery." (*People v. Costa* (1963) 218 Cal.App.2d 310, 316.) We assume, for the sake of argument, that evidence of self-defense could be used to show the intent to steal arose only after force was used, or that the force was not motivated by the intent to steal. (See *People v. Anderson, supra,* 51 Cal.4th at p. 994; *People v. Turner, supra,* 50 Cal.3d at p. 688.)

There was not sufficient evidence that Grinolds's intent to steal only arose after E.M. used force on him, or that the force Grinolds used was not motivated by the intent to steal. Specifically, the jury observed the video of Grinolds's conduct in the convenience store, and heard him testify he had no explanation for his decision to take the glass pipe. Grinolds testified he had money to pay for the pipe, but took it out of habit. The jury could reasonably conclude Grinolds's intent from the outset was to steal a glass pipe, and thus the intent to steal motivated his use of force to stab E.M., who was frustrating his escape. (See *People v. Gomez, supra*, 43 Cal.4th at pp. 264-265; *People v. Estes, supra*, 147 Cal.App.3d at p. 28.) Under these circumstances, instructing on self-defense would have added a nonexistent defense to the crime of robbery. Accordingly, the trial court properly refused to instruct that CALCRIM No. 3470 also applied to robbery. (See *People v. Anderson, supra*, 51 Cal.4th at p. 999 ["As defendant's theory of accident concerning the use of force added a nonexistent element . . . to the offense, an instruction on that theory would have been improper[.]"].)

Grinolds alternatively contends the court had a duty to instruct the jury on its own motion that self-defense was a defense to a robbery charge because it was supported by the evidence. He points to C.S.'s testimony that E.M. restrained Grinolds such that he could not breathe, and the veins were popping out of Grinolds's neck. Grinolds points out he testified E.M. slammed him to the ground and kneed him repeatedly in the kidneys, choked him and headbutted him.

For the same reasons stated above, we reject Grinolds's contention the court erred by failing to instruct on its own motion that self-defense applied to robbery. A trial

court's duty to instruct the jury on its own motion applies to recognized defenses to elements of a charged offense, but not to unrecognized defenses. (*People v. Saille* (1991) 54 Cal.3d 1103, 1117.)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.